

Hai-Guan Zhou v Rodriguez

2019 NY Slip Op 35218(U)

November 7, 2019

Supreme Court, Queens County

Docket Number: Index No. 713344/18

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS
Justice

IAS PART 2

FILED
NOV 15 2019
COUNTY CLERK
QUEENS COUNTY

HAI-GUAN ZHOU,

Plaintiff,

-against-

KARA J. RODRIGUEZ and NILT, INC.,

Defendants.

Index No.: 713344/18

Motion Date: 9/18/19

Motion Seq. No.: 2

The following numbered papers read on this motion by plaintiff for summary judgment in his favor as to liability and dismissing the defendants' affirmative defense of the plaintiff's comparative negligence; cross-motion by defendant for summary judgment dismissing the complaint based on liability and for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104; and cross-motion by plaintiff for summary judgment in his favor on the issue of whether plaintiff sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

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Upon the foregoing papers it is ordered that this motion and cross-motions are determined as follows.

This is an action to recover for personal injuries plaintiff allegedly sustained on September 13, 2017 at the intersection of 108th St. and 36th Ave. in Queens. It is alleged that the vehicle operated by the defendant, Rodriguez while making a left turn from 108th St. on to 36th Ave. struck the plaintiff as plaintiff was crossing 36th St.

In the City of New York, Vehicle and Traffic Law (VTL) § 1151 is preempted (34 RCNY § 4-02[e]) and the Rules of City of New York Department of Transportation (34 RCNY § 4-04) applies with respect to pedestrians. This section provides, in relevant part that, "no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the operator to yield." Notwithstanding the rules and restrictions applicable to pedestrians crossing a street, Section 4-04 (d) provides that "*** the operator of a vehicle shall exercise due care to avoid colliding with any pedestrian." VTL §(a) provides in relevant part that "Notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any *** pedestrian, *** upon any roadway and shall give warning by sounding the horn when necessary."

In support of his motion on the issue of liability, plaintiff submitted a certified copy of the police report and his affidavit which established prima facie his entitlement to summary judgment as to liability. The plaintiff asserted in his affidavit that as he was crossing 36th Ave. in the cross-walk and after looking both ways before crossing, the vehicle operated by the defendant struck him in the stomach causing him to fall onto the hood of the vehicle and then onto the ground.

In opposition, defendant, submitted her affidavit which is sufficient to raise a triable issue of fact as to how the accident occurred and whether plaintiff walked into the defendant's vehicle or whether defendant struck the plaintiff. Plaintiff asserts that as she approached 36th Avenue, she turned on her left turn signal and looked to see if any pedestrian's were in the subject cross-walk. Since there were no pedestrians in the cross-walk, she began to make her turn traveling at about 10mph while applying her break and after turning on to 36th Avenue, a pedestrian suddenly appeared in the cross-walk. She further asserts that she immediately fully applied her break bringing her vehicle to a full stop. After making eye contact with the pedestrian, the pedestrian threw himself onto the hood of her vehicle. Defendant asserts that the pedestrian jumped or threw himself onto the hood of his stopped vehicle.

Contrary to plaintiff's assertion in reply, the defendant's affidavit does not expressly contradict her statement to the police recorded in the police report that she did not see the pedestrian due to sun glare.

A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Lopez v Beltre, 59 AD3d 683, 685 [2009] quoting Scott v Long Is. Power Auth., 294 AD2d 348 [2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (LeBlanc v Skinner, 103 AD3d 202, 211-212 [2012] quoting Gille v Long Beach City School Dist., 84 AD3d 1022, 1023 [2011]).

Accordingly, the plaintiff's motion and defendant's cross-motion for summary judgment on the issue of liability are denied.

With respect to the defendant's cross-motion to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the Insurance Law, he has failed to address the injured plaintiff's contention, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) (see Rosenblum v. Schloss, 175 AD3d 1339, 1340-1341 [2019]).

Accordingly, the defendant's cross-motion to dismiss the complaint on the grounds that the plaintiff failed to sustain a serious injury within the meaning of the Insurance Law is denied.

With respect to the plaintiff's cross-motion for summary judgment in his favor on the issue of whether he sustained a serious injury within the meaning of the Insurance Law, it is denied. The plaintiff failed to submit competent medical evidence to demonstrate that the plaintiff sustained a serious injury within the meaning of the Insurance Law.

Plaintiff failed to demonstrate, prima facie, his entitlement to summary judgment on the issue of a serious injury. Plaintiff claims that he sustained a serious injury to his right shoulder and lumbar spine under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories. To establish a serious injury under these categories plaintiff "plaintiff [is] ... required to demonstrate restricted range of motion based on findings both contemporaneous to the accident and upon recent findings" (Perl v Meher, 74 AD3d 930, 931 [2010], rev'd on other grounds 18 NY3d 208 [2011]). Plaintiff failed to submit any evidence of a restriction in the range of motion in the right shoulder and lumbar spine found at a recent examination (see Ortiz v Salahuddin, 102 AD3d 617 [2013]; Vega v MTA Bus Co., 96 AD3d 506 [2012]). In addition, plaintiff did not advance any medical evidence of an injury causally related to the

accident to demonstrate, prima facie, that he was unable to perform substantially all of the material acts constituting her usual and customary daily activities for at least 90 of the first 180 days following the accident (see Rovelo v Volcy, 83 AD3d 1034[2011]; Pierson v Edwards, 77 AD3d 642). Although plaintiff alleged in his Bill of Particulars that he was confined to home for about 6 weeks, he failed to submit any evidence of, inter alia, what activities comprised his normal daily activities.

Accordingly, the plaintiff's cross-motion for summary judgment in his favor on the issue of serious injury is denied.

Dated: November 7, 2019
D#60

J.S.C.
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